Supreme Court, U. S.
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80-833

No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

LOCAL UNION NO. 35 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

v.

CITY OF HARTFORD, CITY MANAGER OF THE CITY OF HARTFORD, COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD, CONTRACT ENFORCEMENT COMMITTEE OF THE CITY OF HARTFORD, AND RONALD FLETCHER, INDIVIDUALLY AND AS SENIOR FIELD REPRESENTATIVE OF THE COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a City may, as a subordinate governmental body, absent any finding that it or any other municipality has engaged in employment discrimination, voluntarily establish a goal for membership, training and employment of minorities (defined as including women) for public and private construction projects in an area encompassing the City and 23 other separate municipalities and require preferential hiring for and referral to City financed construction projects to the detriment of non-minority job applicants.

2. Whether it is sufficient for such a City legislatively to adopt such a goal and preferential hiring requirement based solely on a non-particularized general finding of industry-wide employment discrimination in the affected area.

3. Whether a Court of Appeals may abjure a resolution of the threshold issue of a City's authority to so legislate in regard to employment discrimination and refuse to remit that issue for resolution to the state court.

4. Whether a City in implementing such a preferential employment requirement for City construction projects may require a union to refer preferentially minority applicants to those projects contrary to the requirements of the union's chronological Out of Work List which was established pursuant to its pre-existing collective bargaining agreement.

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Petitioner LOCAL UNION NO. 35, IBEW, respectfully prays that a Writ of Certiorari issue to review the decision rendered by the United States Court of Appeals for the Second Circuit entered in this case on June 13, 1980.

OPINIONS BELOW

a. Administrative

The opinion of the Contract Enforcement Committee of the City of Hartford dated and rendered July 7, 1977 is unreported and is reproduced in the Appendix A61.

b. Court

The opinion of the United States Court of Appeals for the Second Circuit (App. A1) is reported at 625 F.2d 416 and at 22 FEP Cases 1786. A denial of a petition for rehearing and suggestion for rehearing en banc (App. A68) is not reported. The opinion of the district court (App. A28) is reported at 462 F. Supp. 1271 and 18 FEP Cases 1338, its ruling on post-judgment motions (App. A56) and its judgment (App. A66) are not reported.

JURISDICTION

The opinion containing the judgment of the United States Court of Appeals for the Second Circuit was dated and filed on June 13, 1980. That court's order, denying your petitioner's Petition For Rehearing and Suggestion For Rehearing En Banc was dated and filed on September 3, 1980. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, GOVERNOR'S EXECUTIVE ORDER, CITY CHARTER AND CITY ORDINANCE

1. Constitutional Provisions.

a. United States

Amendments to the Constitution

V.

No person shall be...deprived of life, liberty, or property, without due process of law....

XIV.

Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

b. Connecticut

ARTICLE FIRST:

Sec. 20. No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin.

2. Statutes

a. Federal

28USC §1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree....

28USC §1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:...

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 USC §1981

All persons...shall have the same right in every State... to make and enforce contracts..., and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 USC §1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State,...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 USC §2000e-2

Unlawful employment practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail...to hire...or otherwise to discriminate against any individual...because of such individual's race ...sex, or...

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive...any individual of employment opportunities...because of such individual's race,...religion, sex....

(b) It shall be an unlawful employment practice for an employment agency to fail...to refer for employment, or otherwise to discriminate against, any individual because of his race...sex,...or to classify or refer for employment any individual on the basis of his race,...sex....

(c) It shall be an unlawful employment practice for a labor organization—

(1) to...discriminate against, any individual because of his race,...sex...

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail...to refer for employment any individual, in any way which would deprive...any individual of employment opportunities...or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race,...sex...;or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

. . .

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply...different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system...provided that such differences are not the result of an intention to discriminate because of race,...sex....

b. State - Connecticut

CHAPTER 563
FAIR EMPLOYMENT PRACTICES

. . .

Sec. 31-122:...[Definitions]...

(c) "employment agency" means any person undertaking...to procure employees or opportunities to work;

(d) "labor organization" means any organization which exists for the purpose,...of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment...

(f) "employer" includes the state and all political subdivisions thereof and means any person or employer with three or more persons in his employ...

(h) "commission" means the commission on human rights and opportunities created by section 31-123....

Sec. 31-123. Commission on human rights and opportunities. Appointment. Duties.

The commission shall...investigate the possibilities of affording equal opportunity of profitable employment to all persons, with particular reference to job training and placement. The commission shall compile facts concerning discrimination in employment, violations of civil liberties and other related matters. The commission shall investigate and proceed in...all cases of discrimination in employment because of race, color, religion, sex, age, national origin or ancestry....

§31-125.

The commission [on human rights and opportunities] shall have the following powers and duties:

. . .

(e) to receive, initiate, investigate and mediate complaints of unfair employment practices....

§31-126. Unfair employment practices.

It shall be an unfair employment practice (a) for an employer, by himself or his agent...because of the race,... sex...of any individual, to refuse to hire...such individual or to discriminate against him in...terms, conditions or privileges of employment; (b) for any employment agency...to fail or refuse to classify properly or otherwise to discriminate against, any individual because of his race,...sex...; (c) for a labor organization, because of the race,...sex...of any individual to...discriminate in any way against any of its members or against any employer or any individual employed by an employer...; (e) for any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts herein declared to be unfair employment practices or to attempt to do so....

§31-127. Procedure.

Any person claiming to be aggrieved by an alleged unfair employment practice may...file with the commission a complaint.... The commission...may issue a complaint.... After the filing of any complaint, the chairman of the commission shall refer the same to a commissioner...to make prompt preliminary investigation...and, if such commissioner...determines...that there is reasonable cause for believing that an unfair employment practice has been...committed...he shall immediately endeavor to eliminate the...practice.... In case of failure to eliminate such practice, the...investigating commissioner shall certify the complaint and the results of his investigation to the chairman of the commission.... The chairman of the commission shall thereupon appoint a hearing tribunal.... If...the tribunal finds that a respondent has engaged in any unfair employment practice, it shall...cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair employment practice and further requiring such respondent to take such affirmative action...as in the judgment of the tribunal will effectuate the purpose of this chapter....

§ 31-128. Enforcement of orders. Appeals.

(a) The commission may...petition the court...for the enforcement of any order issued by a tribunal under the provisions of this chapter and for appropriate temporary relief or a restraining order.... The court shall have jurisdiction of the proceedings and of the questions determined thereon, and shall have the power to grant such relief by injunction or otherwise, including temporary relief, as it deems just and suitable and to make and enter...a decree enforcing...any order of the commission or hearing tribunal....

[Note: The Connecticut legislature in 1980 adopted Public Act 80-422 which amended many of the above provisions in Chapter 563. The amendments were technical in nature and did not change the substance of the legislation set out above.]

3. Governor's Executive Order No. 3

WHEREAS, sections 4-61d(b) and 4-114a of the 1969 supplement to the general statutes require nondiscrimination clauses in state contracts and subcontracts for construction on public buildings, other public works and goods and services,...

NOW, THEREFORE, I, THOMAS J. MESKILL, Governor of the State of Connecticut, acting by virtue of the authority vested in me under section twelve of article fourth of the constitution of the state, as supplemented by section 3-1 of the general statutes, do hereby ORDER and DIRECT, as follows, by this Executive Order:

I

The labor commissioner shall be responsible for the administration of this Order.... Upon the promulgation of this Order, the commissioner of finance and control

shall issue a directive...to all state agencies, that...all state contracts and subcontracts for construction on public buildings, other public works and goods and services shall contain a provision rendering such contract or subcontract subject to this Order, and that such contract or subcontract may be cancelled, terminated or suspended by the labor commissioner for violation of or noncompliance with this Order or state or federal laws concerning nondiscrimination....

III

Whenever the contractor...has a collective bargaining agreement...with a labor organization...the labor commissioner may require a compliance report to be filed with... the labor commissioner...by such organization...to the effect that the signer's practices and policies...do not discriminate on grounds of race, color, religious creed, age, sex or national origin, or ancestry of any individual, and that the signer will either affirmatively cooperate in the implementation of the policy and provisions of this Order, or that it consents and agrees that recruitment, employment and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order....

X

(a) The labor commissioner may hold or cause to be held hearings, prior to imposing ordering or recommending the imposition of penalties and sanctions under this Order... [T]he labor commissioner may...

> (2) Recommend to the commission on human rights and opportunities that in cases in which there is substantial or material violation or threat thereof of the contractual provision or related state statutes concerned herein, appropriate proceedings be brought to enforce them....

(4) Cancel, terminate, suspend...any contract...for failure of the contractor...to comply with the nondiscrimination provisions of the contract....

XIII

The labor commissioner may delegate to any officer, agency or employee in the executive branch any function or duty of the labor commissioner under this Order except authority to promulgate regulations of a general nature....

4. Charter - City of Hartford

Chapter II
POWERS OF THE CITY

Sec. 5. Power to adopt regulatory ordinances.

The city shall have power to adopt ordinances not in conflict with the general statutes or the provisions of this charter, for the preservation of the public peace, health, safety, comfort and welfare of the inhabitants of the city and to provide penalties for the violation thereof enforceable in the city and police court but not exceeding a fine of one hundred dollars ($100.00) or imprisonment for more than thirty days or both....

Sec. 7. General grant of powers.

The city shall have not only all the powers specifically granted by this charter but all powers fairly implied in or incident to the powers expressly granted, and all other powers incident to the management of the property, government and affairs of the city the exercise of which is not expressly forbidden by the constitution and general statutes of the State of Connecticut....

Chapter VIII

Sec. 11. Contracts for public works and improvements.

The council shall establish by ordinance rules and regulations under which contracts shall be made and

STATEMENT OF THE CASE

Introduction

Local Union No. 35 is an electrical workers' union which has a contract with an association of electrical contractors which provides that the latter shall use the Union's hiring hall for job referrals. The Union in making referrals uses a non-discriminatory Out Of Work List that lists applicants in chronological order of their signing up and the worker on the list the longest is referred out first. By direct and indirect means the defendant City in attempting to enforce its affirmative action plan requires the Union to jump minorities on the list and refer them in preference to non-minorities who have "seniority" on the list. The Union sought declaratory and injunctive relief in the district court of Connecticut invoking its jurisdiction under 28 USC Sec. 1343(3) and (4)[1] and also its pendent jurisdiction for the purpose of invalidating the City's affirmative action plan contending, *inter alia*, that the plan mandates discriminatory treatment of non-minority employees on the basis of race, in violation of the 14th Amendment to the United States Constitution, 42 USC sec. 1981, 42 USC sec. 1983, and state statutory and constitutional standards. (App. A28-35) The district court denied the Union's motion for summary judgment for a preliminary injunction and granted defendants' cross motion for summary judgment. (App. A28) The Union thereafter filed a Motion to Amend and Make Additional Findings of Fact, a Motion for a New Trial, a Motion to Alter and Amend Judgment, a Motion for Permission to File Third Amendment to Complaint, a Motion for Permission to Amend Proposed Third Amendment to Complaint, and a Motion for Permission to File Fourth Amendment to Complaint. In a subsequent ruling the district court below denied all of the aforesaid post-judgment motions.

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[1]The district court would also have jurisdiction under 28 U.S.C. sec. 1331. The matter in controversy exceeds $10,000 and arises under the Constitution or laws of the United States.

(App. A56) The Union then appealed to the United States Court of Appeals for the Second Circuit ("Court of Appeals") from the judgment below.

The appeal was heard by a three judge panel and on June 13, 1980, a majority of the panel affirmed the judgment below, one judge dissenting. (App. A1) The Union then filed a Petition for Rehearing and Suggestion for Rehearing En Banc (hereinafter "Petition for Rehearing") which was denied on September 3, 1980. (App. A68) On October 9, 1980, the plaintiff filed a Notice of Motion for Permission to File a Petition for Reconsideration of its previously filed Petition For Rehearing and the latter motion was denied on October 30, 1980. On October 11, 1980, the plaintiff filed a Notice of Motion for Modification of Decision and Notice of Motion for Modification of Mandate, both of which were denied on October 30, 1980.

Statement Of Facts

The Union is a labor organization. It represents all electrical workers who work for any and all employers with whom Union has a contractual relationship in six counties all in the State of Connecticut and, also in the Westerly Township of Washington County, Rhode Island. (App. A2) The Union has entered into a collective bargaining agreement with the Central Connecticut Chapter, Hartford Division, National Electrical Contractors Association, Inc. (hereinafter referred to as "NECA"). Said agreement applies to all employers that assent to be bound by it. (App. A31-32). Under said agreement the Union is the sole and exclusive source of referral of applicants for employment with assenting firms. The referral procedure is open to both members and non-members of the Union (App. A32) and the Union is required to refer applicants without discrimination (App. A109). In brief, the referral procedure is on the basis of referring applicants in the order of their place on the Out of Work List. The Out of Work List lists out of work applicants in the chronological

order of the dates they register their availability for employment. (App. A49) Under Article III, section 25(b), of said labor agreement, a contractor is prohibited from discriminating against any employee. (Ct. of App. Jt. App. A6, A91).

In 1975, the City passed an Ordinance, entitled "Article X. Affirmative Action Plan," as part of the Municipal Code of the City of Hartford. (App. A4, A71). Among the stated purposes of said Ordinance is that of ensuring equal employment opportunity for minority group persons [defined as persons of Black, Puerto Rican, Spanish-American, Oriental or American Indian ethnic or racial origin and women] in all phases of construction work performed pursuant to major contracts offered and awarded by the City under the provisions of the (City) Chater and the (City) Code. (App. A71, A73). The Ordinance contains a recitation of legislative policy and findings which are, in pertinent part: (a) Many contractors, labor unions, hiring halls, crafts and trades in the construction industry in the Greater Hartford Area have discriminated, and continue to discriminate, against minority group persons and women....; (c) The continuing effects of past and present discrimination against minority group persons and women by the construction industry may be prevented, mitigated and/or eliminated by an affirmative action plan....; (g) The Thirteenth and Fourteenth Amendments to the United States Constitution, Article 1, Section 20 of the Constitution of the State of Connecticut, 42 United States Code, Section 1981, 42 United States Code, Section 2000(e), Presidential Executive Order Numbers 11246 and 11375, the Governor's Executive Order Number 3, and Chapter II, Sections 5 and 7 and Chapter VIII, Section 11 of the Charter authorize and mandate that the city adopt an affirmative action plan to be incorporated in all major construction or improvement contracts to insure that no public funds are used to promote, maintain or effectuate the denial of equal employment opportunity. (App. A71-72).

The Ordinance, in sec. 2-325 thereof, requires the City Council to adopt a Hartford Affirmative Action

Plan. (App. A74) Pursuant to section 2-328 of said Ordinance, if a labor organization performs substantial construction work beyond the Greater Hartford Area, such organization will be allowed to participate in the construction work required by a City contract but only if it is "certified" by the City Manager or his designee. (App. A76) In order to be "certified" under the above procedure, the labor organization is required to submit an affidavit stating that it agrees with Hartford's affirmative action plan and will make a good faith effort to comply with its provisions. The city manager (or its designee) may issue a certification under the foregoing only if, *inter alia*, it finds that public funds will not be used, directly or indirectly, to promote or maintain discrimination as a result of such certification and the documents and data submitted clearly indicate that such organization has accepted, is accepting or will in the immediate future be accepting adequate minority group and women participation in its operations. (App. A76-77) The Union was so certified on October 31, 1975. (App.A7)

Pursuant to said Ordinance the City adopted "The Greater Hartford Affirmative Action Plan." (App. A4) Said Plan is incorporated into City construction contracts; a breach of the Plan constitutes a breach of the construction contract and subjects the contractor to remedies provided in the Ordinance. (App. A5, A82). The Plan provides that the parties to it agree to make every good faith effort over a five year period to achieve a level of membership and employment of qualified minority group employees on public and private construction work in the Hartford Labor Market area [2] to at least 15% (App. A83-86) and the City is required to set minimum participatory goals on City projects for minority personnel which shall be at least 15% of the daily manhours worked by each trade on each project. (App. A86-87). The contractor and its labor referral union

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[2]Defined as encompassing Hartford and 23 surrounding municipalities. (App. A84)

are to bear the responsibility to achieve that goal. (App. A86). The Plan deals with the training of applicants and also requires that all apprentice applicants shall be subject to the guidelines set forth by federal and state requirements for registered apprenticeship programs. (App. A97). The Plan provides that it is not the intent of the Plan to interfere with any bona fide seniority system which does not perpetuate past discrimination (App. A103) and that it is not the intent of the City to violate any laws of any governmental authority having jurisdiction of the subject matter of the agreement [Plan] and the City agrees that, in the event any provision of the agreement [Plan] is held unlawful the remainder shall remain in force, if severable. (App. A104). At the May 16, 1977, hearing before Judge Blumenfeld, the City conceded that if there is any inconsistency between federal and state law and the Plan, the Plan must yield to the federal or state law. (Court of Appeals Jt. App. A44)

Rather than setting a "goal" of 15% the City has set a mandatory "quota" of 15% on City projects for the employment of minority persons on a trade-by-trade basis for the contractor's daily work force. (Court of Appeals Jt. App. A7-A8, A34, A101).

By Memorandum dated February 28, 1977 from Arthur Johnson, executive director of the Commission on Human Relations for the City of Hartford addressed to the City's Contract Enforcement Committee, Mr. Johnson indicated that based on a staff report, the Union's use of its referral list to refer workers to contractors performing construction work on City projects will be directly in conflict with the minority manning provisions of the City's Plan. (App. A105) The staff report recited that contractors reported that their referral agreement with Local 35 preempted their utilizing other sources to comply with the minority manning requirements for City projects. (App. A107) The report stated that the Union informed the City that it was using a rotation system for the referral of workers; that

the Union's position was that such rotation list took precedence over any minority manning requirements in the Plan; that the following statistics were supplied; IBEW #35 total membership - 550; Working - 229; Not Working - 321; Total minority - 41; Minority working - 24; Minority not working - 17; that as of 2/8/77 the rotation list contained 321 names; and that minority workers occupy the following positions on that list: 85, 94, 121, 145, 157, 166, 167, 184, 188, 204, 212, 224, 236, 238, 287, 299, 308. The report concluded that the use of the list for the referral of minority workers would directly conflict with the minority manning provisions of the "Greater Hartford Plan." (App. A107-108).

In the NECA contract, under Article VII (Referral Procedure) (App. A109) the Union is to maintain a register of applicants for employment based on four groups. (App. A110) Group I, the highest group, consists of applicants who have four or more years of experience and are journeymen and who are residents of the geographical area constituting the normal construction labor market as defined therein. (App. A110) In the instant case, all the [321] workers who were unemployed were in Group I, all of the [321] applicants on the Out of Work list were in Group I, all the [17] minorities on that list were in Group I, and all of the [41] minority members of the Union were in Group I. (Court of Appeals, Jt. App. A109, A116, A117, A126)

On April 5, 1977, the plaintiff filed its Complaint in the United States District Court in Hartford, Connecticut seeking therein a preliminary injunction. (Court of Appeals, Jt. App. A4).

The City's Contract Enforcement Committee held a public hearing to consider Mr. Johnson's determination of the Union's non-compliance. (App. A33).

At the hearing Mr. Johnson testified that the Union was in violation of the Plan and the Ordinance [solely] because of the way the Union operated its referral list. (Court of Appeals Jt. App. A112-A113). Mr. Aresco, attorney for the Committee ruled that the issue was that the operation of the list would not supply "the necessary quota" that the City required. (Court of Appeals Jt. App. A113). Mr. Johnson testified that when the Union was certified under the Plan in October, 1975, it had supplied to his office as part of the certification procedure a copy of its labor agreement with NECA. (Court of Appeals Jt. App. A114). Mr. Fletcher, Mr. Johnson's assistant, then testified that he recommended to Mr. Johnson that the Union be disqualified because its referral list was preempting contractors from meeting the minority manning requirements. (Court of Appeals Jt. App. A115). He explained that workers signed the list when they became unemployed and the earliest one signing was referred first. (Court of Appeals Jt. App. A115, A116, A117). He agreed that the minority workers were in the position they were on the list because that was when they signed it. (Court of Appeals Jt. App. A117). He stated that over 50% of the Union members were unemployed and that the percentage of minorities unemployed was less than the percentage for the total membership unemployed. (Court of Appeals Jt. App. A118). Both Mr. Fletcher and Mr. Johnson testified that the Union should, in effect, jump minorities ahead of others on the list when making job referrals. (Court of Appeals Jt. App. A119-A120).

Robert W. Murray, business manager for the Union, testified that the referral list wor. :d in an impartial and neutral chronological manner (Court of Appeals Jt. App. A122-A123); that the list was established about a year and a half ago in the winter of 1975-1976 (Court of Appeals Jt. App. A124-A125); that before that there was no need for a list because there was a lack of unemployment (Court of Appeals Jt. App. A124); that about January 1977 the Union received a letter from Mafco (Court of Appeals Jt. App. A104) [a contractor] requesting a

minority person which would have required referring a worker who was not first on the list (Court of Appeals Jt. App. A123); that prior to the Mafco incident (when Mafco laid off two people and called for two black replacements) the Union had jumped men on the list to satisfy the affirmative action program (Court of Appeals Jt. App. A125), but when the Mafco request was made the Union consulted with its attorney and he advised the Union that under State and Federal law the Union was obligated to operate the list strictly on a rotation basis and, therefore, Mafco's request could not be honored (Court of Appeals Jt. App. A123-A124); that the Union followed that advice and it would continue to operate the list strictly in rotation of the top man on the list. (Court of Appeals Jt. App. A124). Mr. Murray testified that the Out of Work List was established pursuant to section 11 (page 20) of the NECA contract. (Court of Appeals Jt. App. A126). Said sec. 11 provides as follows: "The Union shall maintain an 'Out of Work List' which shall list the applicants within each group in chronological order of the dates they register their availability for employment." (App. A112) [The Transcript of the Commiteee hearing was submitted to the District Court as part of the support for the plaintiff's later filed Motion for Summary Judgment. The above evidence was undisputed.]

The Contract Enforcement Committee decided that use of the referral list evidenced the Union's lack of good faith effort to comply with the Plan and, therefore, the Union would be decertified. (App. A61). The Committee also found that the Union had been in compliance when it previously had referred minorities out of chronological turn. (App. A62).

Thereafter, in the trial court, the City filed a motion for summary judgment and the Union filed a motion for summary judgment on its request for a preliminary injunction. A court hearing was held on said motions on August 3, 1977, before Judge Blumenfeld. (Court of Appeals Jt. App. A127, A128). At said hearing the following occurred:

"**The Court:** The plaintiff has not challenged and does not challenge that there is past discrimination... **Mr. Ellis:** ...Your Honor...suggested that there has been some finding of past discrimination which the union does not challenge. That is not correct. There has been no finding of past discrimination against this union. That is not in issue in this case at all.... I don't dispute that the city has made...a legislative finding, your Honor, as a generality. But as to this particular union, there has been no particular finding that this union is guilty of past discrimination which has any continuing effects today." (Court of Appeals Jt. App. A132-A133). Mr. Ellis' statement was never disputed.

At the conclusion of the August 3, 1977, hearing the court invited the parties to submit to it any new matter that each might come across in their research pending the trial court's ruling. (Court of Appeals Jt. App. A138).

On March 2, 1978, the defendants filed "Defendants' Supplemental Memorandum In Opposition to Plaintiff's Motion for Preliminary Injunction And Summary Judgment, And In Support of Defendants' Motions to Dismiss And For Summary Judgment"[3] (hereinafter referred to as "Supplemental Memorandum"). In defendants' Supplemental Memorandum (pp. 13-14) the claim was made that the City council had substantial evidence before it to support its legislative finding and that the statistical evidence pointing to discrimination in the construction industry was overwhelming (p. 20). In its April 1978, memorandum in response thereto,[4] the Union explained that at the "stage of the proceedings" in which the case was at that time the City's legislative finding was not in issue and therefore the offer of the evidence of legislative history and the argument based thereon

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[3]Said memorandum is docket entry no. 32 and appeal index no. 3.

[4]Said memorandum is docket entry no. 36 and appeal index no. 27.

was irrelevant. (p. 8). Even so, the Union presented an argument in said memorandum that the "evidence" submitted by the City did not, in fact, support any legislative finding of past discrimination. (pp. 8-11). After the *Bakke*[5] case was decided the issue of the authority of the City to make its legislative finding was argued. On page 8 of "Plaintiff's Supplemental Brief Re Bakke"[6] the Union made the claim that the City had no authority to make any such legislative finding because it possessed no authority to adopt the Ordinance or Plan. (Court of Appeals Jt. App. A166).

On July 3, 1979, the Union filed a Second Amendment to the Complaint in which it asserted a cause of action against the City under 42 USC sec. 1983. (Court of Appeals Jt. App. A152).

On December 11, 1978, the trial court filed its Ruling on Pending Motions in which it denied the Union's motion for summary judgment for a preliminary injunction and granted the City's motion for summary judgment. (App. A28). The Union then filed a variety of post judgment motions. (Court of Appeals Jt. App. A208-A214). In its Motion For A New Trial it was claimed that the court erred in refusing to consider the Union's claim that the City had no legal authority to adopt its Ordinace and Plan. (Court of Appeals Jt. App. A211). The district court denied the post judgment motions in its Ruling on Pending Motions filed March 7, 1979. (App. A56).

In "Defendants Memorandum In Opposition to Plaintiff's Post-Judgment Motions.[7] filed January 29,

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[5]438 U.S. 265 (1978).

[6]Said brief is docket entry no. 39 and appeal index no. 30.

[7]Said memorandum is docket entry no. 52 and appeal index no. 5.

1979, the City conceded that "The affirmative action ordinance is not directed against Local Union No. 35...." (memo. pp. 5-6).

In its brief before the Court of Appeals, the Union pursued its claim that the City possessed no authority to adopt an affirmative action plan Ordinance or Plan in implementation thereof (P's Court of Appeals Brief, pp. 14-21). In affirming the judgment below, the Court of Appeals ignored said issue (App. A1) In its Petition for Rehearing, plaintiff argued that the Court of Appeals erroneously failed to resolve this issue. (P's Petition for Rehearing, p. 7). The Petition For Rehearing was denied without opinion. (App. A68). The plaintiff then filed a Notice of Motion for Permission to file Petition for Reconsideration of said Petition for Rehearing on the asserted ground that plaintiff's counsel had subsequently discovered two unpublished Connecticut state trial court decisions both of which are currently on appeal to the Connecticut Supreme Court wherein the City of New Haven's Commission on Equal Opportunities [established by City ordinance] and its orders were ruled invalid on the ground that the City had no statutorily delegated authority to regulate employment practices protective against racial discrimination. As an additional ground, plaintiff's counsel pointed to newly enacted Connecticut Public Act 80-403 [of which said Counsel had been previously unaware] which was passed in response to the above unpublished cases and which gave municipalities [prospective] power to establish equal rights and opportunities commissions which would have power, *inter alia*, to remedy employment discrimination. The purpose of seeking to file the petition for reconsideration was to argue to the Court of Appeals that since it had refused [and, thus, abstained] from addressing the threshold state law issue of the City's authority to adopt its Ordinance and Plan it should remit that question to the state court for resolution. Said Motion was denied on October 30, 1980. For the same purpose, the plaintiff on October 11, 1980 filed with the Court of Appeals a Notice of Motion for Modification of Decision

and a Notice of Motion For Modification of Mandate. The latter motions were denied on October 30, 1980.

ARGUMENT

A. A CITY, AS A SUBORDINATE GOVERNMENTAL BODY, MAY NOT LEGISLATIVELY ESTABLISH AN AFFIRMATIVE ACTION PLAN IN REGARD TO PUBLIC AND PRIVATE CONSTRUCTION EMPLOYMENT BASED ON GENERALIZED NON-SPECIFIC FINDINGS OF EMPLOYMENT DISCRIMINATION NOR MAY IT, ON THE BASIS OF SUCH FINDINGS, JUSTIFY RACIAL PREFERENCES FOR HIRING ON CITY CONSTRUCTION PROJECTS.

The City could not have induced anyone to agree to its Plan if thereby an entity would be deemed to have admitted that it had engaged in discriminatory acts. So the City's Ordinance indulged in no particularized findings of discrimination which in turn permitted entities to join the Plan free from fear they would be open to accusations of discrimination such as those speculatively indulged in by the Court of Appeals. (App. A11) Thus, the Ordinance and Plan did not assume or establish that those that joined it were guilty of discrimination. Therefore, one question raised by this case is whether a political subdivision of a state can require an innocent participant in its affirmative action plan to refer for employment minorities in preference to non-minorities. Neither *Bakke, Weber* or *Fullilove*[8] involved this issue. In general terms, *Fullilove* involved the right to bid on a government contract that did not involve the status of the bidders as individuals. It could be said that there

[8]Respectively, (1978) 438 U.S. 265; (1979) 443 U.S. 193; (1980) 100 S.Ct. 2758.

was no personal value of freedom to pursue a vocation that was derogated by the classification of bidders in *Fullilove*. But in our case there is implicated the status of the non-minority job applicants as individuals and this Court has held that the basic "right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, (1915), 239 U.S. 33, 41. Here the non-minorities are penalized as individuals solely because of their race. Since the preferential referral required by the City constitutes state action detrimental to persons solely because of that person's race the requirement is offensive to the Equal Protection Clause of the Fourteenth Amendment.

Since the governmental action in this case trenches upon values that are fundamental that action should be the product of a deliberate and broadly based political judgment. Such governmental action should be the product of a process that is entitled to speak for the society. *Associated Gen., ETC. v. San Francisco Unified SCH.*, (CA 9th, 1980), 616 F.2d 1381 1390. The City, as a subordinate governmental institution, does not meet that test for its action "is likely to be the product of partial political pressures that are not broadly reflective of society as a whole." *Sandalow, Judicial Protection of Minorities*, 75 Mich. L. Rev. 1162, 1188 (1977). As a subordinate governmental body not possessing the sweeping powers of a Congress nor even the less sweeping powers of a state legislature, the City had no constitutional right to address regional discrimination, identify it by non-particularized findings and then justify its racial preference policies thereon. *Associated Gen., ETC.*, supra, and at 1390 n. 14; *Fullilove v. Klutznick* (1980) 100 S.Ct. 2758, at p. 2794 n. 14. ("The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body." Powell,J.)

B. THE CITY POSSESSED NO AUTHORITY TO ADOPT THE ORDINANCE OR PLAN

The City of Hartford (hereinafter "City") is a political subdivision of the State of Connecticut occupying a part of the territorial area of the state. *Norwalk v. Daniele,* (1955), 143 Conn. 85, 88, 119 A.2d 732. As a municipality it is solely a creation of the state and it has no inherent powers of its own. *Pepin v. Danbury,* (1976) 171 Conn. 74, 83, 368 A.2d 88. Unlike the inherent powers that appertain to the state legislature the only powers that a Connecticut town or municipality has are those granted to it by the state. *Pepin,* supra, p. 83; *Council of the City of West Haven v. Hall,* (Conn. Supreme Court, Apr. 15, 1980) 41 Conn. Law Journal, No. 42, pp. 8, 10. The only appropriate sources of authority which the City relies on as authorizing it to enact its Ordinance are Article 1, Section 20 of the Connecticut Constitution (supra, p. xi), the Governor's Executive Order Number 3 (supra, p. xvi) and Chapter II, Sections 5 and 7 and Chapter VIII, Section 11 of its Charter.[9] (supra, p. xviii) Article First, section 20 of the State Constitution provides that "No person shall be denied the equal protection of the law nor be subjected to ...discrimination in the exercise of his civil...rights because of ...race...." The city has been given no enforcement power in regard to Section 20 and that section does not constitute an express source of authority for its Ordinance. *Associated Gen., ETC. v. San Francisco Unified SCH.,* (CA 9th, 1980), 616, F.2d 1381, 1386-1388; *Matter of Broidrick v. Lindsay,* (1976) 39 NY 2d 641, 350 N.E. 2d 595; see, also, *Southeastern Community College v. Davis,* (1979) 442 U.S. 397 (Rehabilitation Act prohibiting discrimination against handicapped persons did not impose affirmative action obligation on recipients of

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[9]The claimed federal sources of power set forth in the Ordinance [App. A72] are inapposite. There was no evidence that any federal authority required the City to adopt the Ordinance or Plan. The City has no enforcement authority under said federal sources.

federal funds.) The Governor's Executive Order Number 3 applies only to state contracts and does not deal with municipalities in any respect. (supra, p. xvi).[9a] Charter Sec. 5 provides that the City may not adopt ordinances in conflict with the general statutes, (supra, p. xviii). This is not a grant of authority to pass the Ordinance. Charter section 7 provides that the City shall have implied powers incident to the powers expressly granted. (supra, p. xviii). Since there was no express power there could be no implied power to pass the Ordinance. *Council of the City of West Haven*, supra. Charter section 11 provides that the City may pass ordinances concerning city contracts and provides that the same may be awarded to the lowest *responsible* bidder. (supra, p. xviii). The criterion of "responsible" bidder does not authorize a requirement that a bidder adhere to an affirmative action plan. *Associated Gen., Etc. v. San Francisco Unified SCH.*, supra, p. 1385; see *Austin v. Housing Authority*, (1956), 143 Conn. 338, 344-346, 122 A.2d 399, and *Matter of Broidrick v. Lindsay*, (1976), 39 NY 2d 641, 648, 350 N.E. 2d 595.

A Connecticut municipality may not pass an ordinance which deals with the same subject matter as that dealt with by an act of the state legislature. *Southport v. Ogden*, (1854), 23 Conn. 128, 132-133. If the legislature has delegated a field of regulation to a state board or agency the state has preempted the field and any city ordinance dealing with the same subject matter is invalid. *State v. Brennan*, (1965), 3 Conn. Cir. 413, 216 A.2d 294, 296-297. Chapter 563 of the state statutes (Conn. Gen. Statutes, secs. 31-122 et seq., supra, p. xiv) is entitled "Fair Employment Practices" and under it discrimination in public and private employment is prohibited. Conn. Gen. Statutes sec. 31-122(c) and (f), 31-126(a) (c) and (e). Acts of prohibited employment discrimination may be rectified by the state's Commission on Human Rights and Opportunities in response to a complaint or on its own initiative and it may make

[9a] A Connecticut municipality is not a state agency. *Bridgeport v. Agostinelli*, (1972) 163 Conn. 537, 550, 316 A.2d 371.

remedial orders which may include *affirmative action* relief. Conn. Gen. Stat. secs. 31-125(e), 31-127, 31-128. The purpose of Chapter 563 was to delegate to the Commission the duty to eliminate employment discrimination which it may accomplish by initiating class wide complaints and provide for class wide relief. The Act is co-extensive with 42 USC sec. 2000e-2. *Pik-Kwik Stores v. Commission on Human Rights and Opportunities,* (1976), 170 Conn. 327, 330-331, 368, A.2d 1210; *Groton v. Commission on Human Rights and Opportunities,* (1975), 169 Conn. 89, 99-100, 362 A.2d 1359; *Veeder-Root Co. v. Commission on Human Rights and Opportunities,* (1973) 165 Conn. 318, 327-330, 334 A.2d 443. Thus, the field of rectifying employment discrimination on a class wide basis by providing for affirmative relief in the nature of racial preference hiring has been preempted by the state abrogating all city ordinances dealing with the subject. *Midwest Employers Council, Inc. v. City of Omaha,* (1964), 177 Neb. 877, 881-888, 131 N.W. 2d 609 (Omaha's ordinance prohibiting employment discrimination was invalid since city had no power to legislate on fair employment practices and power concerning labor relations and practices including civil rights lies in the state not in a municipality); *Associated Gen., ETC v. San Francisco Unified SCH.,* (CA 9th, 1980), 616 F.2d 1381 (a school board's affirmative action policy lacked legislative authorization and could not be legally imposed); *Matter of Broidrick v. Lindsay,* (1976), 39 N.Y. 2d, 641, 648-649, 350 N.E. 2d 595 (Mayor of NYC's affirmative action plan regulations held invalid as unauthorized under the law);[10] *Lige v. Town of Montclair,* (1976), 72 NJ 5, 367 A.2d 833 (a racial hiring quota for Town of Montclair imposed by state agency held to be in violation of

[10]*Broidrick* was followed by *Fullilove v. Beame* (1979) 48 N.Y.2d, 376, 398 N.E. 2d, 765 and *Fullilove v. Carey,* (1979) 48 N.Y. 2d 826, 399 N.E. 2d 1203 (affirming 62 A.D. 798, 406 NYS 2d 888). *Beame* held that NYC Mayor's mayoral order as well as regulations were invalid as in excess of legislative authorization and in *Carey* the Governor's executive order requiring contractors to undertake programs of affirmative action was ruled invalid as being in excess of authority.

state constitution prohibiting discrimination); *Hull v. Cason*, (Cal. Ct. App., 1978) 88 CA 3d 768, 151 Cal. Rptr. 438 (California anti-discrimination statutes would invalidate fire department affirmative action plan); and, see, *Hiatt v. City of Berkeley*, (Cal. Ct. App., 1979) 88 CA 3d 503, 151 Cal. Rptr. 895 (Berkeley's affirmative action plan held unconstitutional) and *Brunetti v. City of Berkeley* (U.S.D.C.N.D. Cal., 1975) 12 FEP Cases 937 (same result).

The Plan sets a 15% minority membership and employment goal for *private* as well as public construction projects for those doing business with the City. (App. A86-87). In attempting to regulate private (as well as public) construction projects, the City used its contracting policy to promote an extrinsic social policy for which there was no grant of legislative power. *Matter of Broidrick*, supra, p. 648.

In short, the City had no power to legislate in regard to the employment practices of privately owned contractors or the training, membership, employment or referral practices of unions in order to provide affirmative relief for minorities.

C. THE CITY'S LACK OF AUTHORITY TO ADOPT THE ORDINANCE AND PLAN IS A THRESHOLD STATE LAW ISSUE WHICH THE COURT ERRONEOUSLY ABSTAINED FROM RESOLVING.

Both in *Regents of State University of California v. Bakke*, (1978), 438 US 265 and in *Fullilove v. Klutznick* (1980) 100 S.Ct. 2758, it was indicated that a *threshold* issue in determining the legality of racial preference legislation is whether the promulgating body possessed

the requisite authority to enact such legislation. Since resolution of such an issue is a necessary predicate to an intelligent resolution of the ultimate question of whether the means adopted to redress identifiable employment discrimination passes constitutional muster the threshold issue *must* first be resolved. *Cuyler v. Sullivan*, (1980), 100 S.Ct. 1708, 1715, n. 6. The threshold issue of the City's authority to adopt its Ordinance and Plan was raised below. (supra, 10-11) The Court of Appeals ignored[11] that fundamental claim and dealt first and last with the ultimate question. It was an erroneous exercise of judicial power for the Court of Appeals to so abjure its proper judicial function; *Barr v. Matteo* (1957), 355 U.S. 171-173; *Associated Gen., ETC. v. San Francisco SCH.*, (CA 9th, 1980), 616 F.2d 1381, 1384; unless the *absention doctrine* or a proper exercise of its *pendent jurisdiction* over state-law questions permitted it to refrain from resolving the state-law issue and proceed directly to the ultimate constitutional question without remitting the former to the State Court or resolving it itself. There was error either because the absention doctrine required state court remission; *Railroad Commission of Texas v. Pullman*, (1941), 312 U.S. 496, 498-501; *City of Chicago v. Fieldcrest*, (1942), 316 U.S. 168-173; or because pendent jurisdiction principles required the appeals court to resolve the issue. *Associated Gen., ETC.*, supra. In failing to properly apply either the *absention doctrine* or its pendent jurisdiction, the Court of Appeals denied to plaintiff its day in court in violation of Due Process. Compare, *Lutcher v. Moore Lumber Co.*, (1910), 217 U.S. 257 (CA denied plaintiffs their day

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[11]The Court of Appeals merely stated that the City's Council was a competent and responsible legislative body citing no Connecticut Constitutional provision, legislation or case law. (App. A11) This does not qualify as a "resolution" of the basic issue. Compare the extensive discussion of such a threshold issue in *Associated Gen., ETC. v. San Francisco Unified SCH.*, (CA 9th, 1980), 616 F.2d 1381.

in court when it refused to rule on issue properly before it.)[12]

D. THE DESTRUCTION OF THE UNION'S NON-DISCRIMINATORY OUT-OF WORK LIST VIOLATED NATIONAL LABOR POLICY.

A seniority system which applies to all races and ethnic groups, is consistent with NLRB precedents, does not have its genesis in racial discrimination and which was negotiated and has been maintained free from any illegal purpose is lawful, does not violate Title VII, and is protected by 42 USC §2000e-2(h) (supra, p. xiii). *International Brotherhood of Teamsters v. United States,* (1977), 431 U.S. 324. A seniority system allots to employees improving employment rights as their relative lengths of pertinent employment increase. *California Brewers Association v. Bryant,* (1980) 444 US 598, 605-606. A referral system, as does a seniority system, allocates entitlements to scarce benefits since it determines who gets an available job. *NLRB v. Houston Chap. Assoc. Gen. Con. of America, Inc.*, (CA 9th, 1965), 349 F.2d 449, 452, cert. den. 382 U.S. 1026 (a hiring hall provides for employee security); see, *Franks v. Bowman Transportation Co.*, (1976), 424 U.S. 747, 766. A seniority system also includes ancillary rules which need not, in and of themselves, operate on a factor involving passage time but which accomplish necessary functions connected with the system. *California Brewers Association v. Abram Bryant,* supra, 607-608.

The Union's referral system divides workers into four groups ranked primarily according to length of

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[12]In addition, said Due Process violation was inconsistent with standards 3.11 and 3.36, *Standards Relating to Appellate Courts, ABA Commission on Standards of Judicial Administration, Approved Draft,* which require an appellate court in a full written opinion to meet in a *candid* fashion, all the issues presented in cases of importance.

work experience. (App. A110) Referrals from each group are made in the order of an applicant's place on an "Out of Work List." (App. A112) This grouping provides for employee security and allocates entitlements to scarce benefits and it qualifies as a seniority system. The rule that referrals within a grouping are to be made from the "Out of Work List" is an ancillary one which is a necessary part of the system within the meaning of *California Brewers Association*, supra. There was no evidence presented, claim made or issue pursued before any of the courts below, to the effect that said system did not apply alike to all races and ethnic groups, that it had its genesis in racial discrimination or that it was negotiated or maintained with an illegal purpose.[13] The Union's referral system was valid under the federal labor laws. *Interstate Electric Company*, (1977), 227 NLRB 1996 (No. 291);[14] *Teamsters Local v. Labor Board*, (1961), 365 U.S. 667. It was a non-discriminatory referral system which could not be set aside absent specific Congressional authorization. *Teamsters Local v. Labor Board*, supra. There being no such authority granted, the district court and the Court of Appeals had no authority to invalidate the Union's Out of Work List. *United States v. East Texas Motor Freight System* (CA 5th, 1977), 564 F.2d 179, 185 (seniority system could not be set aside to satisfy governmental order which, in effect, declared unlawful what Title VII made lawful on the theory that it was a barrier to minority movement to jobs); *Southbridge Plastic Div. v. Local 759*, (CA 5th, 1978), 565 F.2d 913 (conciliation agreement could not override non-discriminatory seniority system since that would, inter alia, conflict with NLRA).

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[13]The district court disclaimed any intention to imply that the Union in operating its hiring hall sought to thwart the City's affirmative action plan. (App. A48 n. 17)

[14]NLRB's analysis as to an aspect of the referral system not at issue in our case was rejected in *Robertson v. NLRB* (CA 10th, 1979) 597 F.2d 1331. But in *Construction Building Materials & Miscl. Driver's Local No. 83*, (1979) 243 NLRB No. 26 at n. 8, 1979-80 CCH NLRB par. 16003, the NLRB disagreed with the 10th Circuit's holding and adhered to its position in *Interstate*.

The Plan, itself, provides that "It is not the intent of this Agreement to interfere with any bona fide seniority system which does not perpetuate past discrimination." (App. A103) The City's action, approved by both lower courts, is in violation of that provision and the national labor policy discussed above.

E. THE CITY'S 15% MINORITY MANNING REQUIREMENT WAS A MEANS TO CONFER A RACIAL PREFERENCE AS AN END IN ITSELF AND BOTH ON ITS FACE AND AS IMPLEMENTED IT WAS IN VIOLATION OF EQUAL PROTECTION.

1. Invalid On Its Face

The Plan required that each craft would make a good faith effort over a *five*-year period[15] to achieve in regard to the qualified minority labor force in the Hartford Labor Market Area (hereinafter referred to as "Region") concerning public and private construction projects a goal of minority training, membership and employment to at least 15% (hereinafter the "Regional Goal."). (App. A83-86) This Regional Goal was to overcome the effects of discrimination which the Ordinance identified as existing on a Region-Wide basis. (App. A71) The Hartford Labor Market Area consisted of Hartford and 23 surrounding municipalities. (App. A84).

The Plan also required a 15% minority manning level (on the basis of manhours) on City of Hartford construction projects. (App. A86) This 15% manning requirement was not a function of or correlated with the

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[15]The Plan provides that achievement of the 15% goal, after consultation between the City and affected parties, shall be set at no less than 1 year and no more than 5 years, as determined by said consultation. (App. A86). There was no showing that the goal as set was to be achieved in less than 5 years. (App. A31).

Regional Goal or with manning levels existing in the other 23 municipalities. Even if a contractor or union was in strict or in excess compliance with the Regional Goal said contractor or union still could be in momentary non-compliance with Hartford's 15% manning requirement because of a temporary inability to supply to Hartford projects sufficient minorities because of their prior utilization elsewhere in the Region or because of their location on a non-discriminatory referral list. To punish such a momentary lapse could only be for a purpose to hire on the basis of race as an end in itself. Even if it is assumed that a local manning requirement could have a rational relationship to the achievement of the Regional Goal in order for it to have any possible chance of doing so it at least would have had to be applied on an across-the-board basis in all of the 24 municipalities in the Region and not solely in Hartford.[16] The lower courts' approval of the Ordinance and Plan, if upheld, would mean that the other 23 municipalities in the Region could each adopt separate Regional Plans[17] each containing its own local manning provision. Even if each of the 23 municipalities was to set its manning level as low as 3% any contractor or union operating on a Region-wide basis would be contending with an aggregate minority manning quota so far in excess of the Regional Goal that it could not possibly bear any rational or reasonable relationship to it.[17a]

The flaw in the 15% Hartford manning provision was that in regard to it the Plan treated Hartford as if

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[16] Although the Plan focused on a Regional remedy and permitted other towns to join it [App. A93] there was no showing that any other town, city or municipality had ever joined the Plan. Also, the Plan made no provision for an adjustment of the 15% Hartford manning level depending on the actual level of minority utilization in the remaining 23 municipalities in the Region in regard to public or private construction projects or in regard to private construction projects in Hartford.

[17] Also, each could arrive at its own definition of what towns should be part of the "region."

[17a] E.g., 15% + (3% x 23) = 84%.

it was the only employer (public or private) in the Region.

2. Invalid As Implemented.

The Union was certified under the Ordinance and Plan on October 31, 1975 and was found by the City to be in violation of the Ordinance and Plan on July 7, 1977, more than three years prior to the date by which it was to achieve the Regional Goal. Apart from the City's objection to the Out of Work List, there was no evidence, claim or issue before either of the lower courts that the Union had failed to satisfy its affirmative obligations under the Ordinance or Plan to achieve a level of minority membership and employment consistent with the Regional Goal.[18] Thus, there was no dispute that the achievement by the Union of a 7.45%[19] minority membership was, at the time in question, in satisfactory fulfillment of the Regional Goal. In these circumstances, the only complaint the City could make and, in fact, the only complaint it did make against the Union was that the Union's then interim minority referrals (from its satisfactory complement of minority and non-minority workers) did not then place on City project jobs a sufficient number of minority workers.[20]

Job layoffs from an ever changing number of contractors occur at sporadic times and in unpredictable

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[18]It should be noted that the City's Plan attempts to remedy minority problems in regard to entrance aspects of the craft employment field, such as, training and apprenticeship programs. (App. A94-98). There was no allegation, issue or proof before the lower courts that that Union was not in full compliance with those aspects of the Plan.

[19](App. A11)

[20]The City made no complaint below that the contractors were not fulfilling their affirmative action plan requirements in any respect except in regard to the Union's operation of the Out of Work List.

numbers. Because of this, minorities are and will always be unevenly distributed on the Out of Work List even if the Union had a 15%, 20%, 30%, 40% or 50%, etc., minority membership or applicant pool and it would be inevitable that at some isolated interval of time such as the one seized upon by the City it would not be able to refer enough minorities to City jobs to satisfy whatever was the City's minority manning requirement unless the Union abandoned the chronological referral of its listed workers. Since the "deficiency" would arise even where a union had been fulfilling its Regional obligations, as here was the case, the purpose of the City's objection and the only result it could have accomplished would be to require the Union to utilize a racial classification in referrals solely as a means to confer a racial preference and not to eliminate traditional patterns of racial discrimination the City had found to exist in the Region. "Such a purpose plainly would be unconstitutional." *Fullilove v. Klutznick,* (1980), 100 S.Ct. 2758, 2790 (J. Powell).

United Steelworkers of America v. Weber, (1979), 443 U.S., 193, does not apply to our case because our case involves state action.[21] Nevertheless, it was held in *Weber* that although a [private] employer is free to achieve a racially balanced workforce by racial preference methods, once it has achieved that goal, it may no longer discriminate in order to maintain a racial balance. In our case, there was no complaint or issue below that the Union had not achieved a racially balanced workforce fulfilling, at that time, the Regional Goal. Thus, any attempt by the City to maintain a racial balance on City construction projects was solely an end

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[21]The Court of Appeals erroneously implied [App. A18] that the plaintiff agreed that the *Weber* ruling permitting a private employee to adopt an affirmative action program required the same result in regard to a racial preference plan adopted by a public body. The plaintiff had made no such concession. (P's Court of Appeals brief, pp. 43-44).

of itself, a requirement to hire or refuse to hire on the basis of race. Any attempt by the City to do so involved state action not precisely tailored to serve any compelling governmental interest and was contrary to Fourteenth Amendment requirements. *Regents of the University of California v. Bakke*, (1978), 438 U.S. 265; *Fullilove v. Klutznick*, (1980), 100 S.Ct. 2758, 2772, 2778-2779, 2790; see *Truax v. Raich* (1915), 239 U.S. 33 (a law requiring at least 80% of the employees of certain businesses to be citizens was held to be an unconstitutional infringement of an alien's right to work).

It was undisputed that the Union had been able to satisfy the City's 15% manning requirement when the Union had previously referred minorities out of chronological turn. (App. A62) Thus, there was no need for nor was there any claim or issue before the lower courts that the Union's complement of minorities in general or the number of minorities on the Out of Work List in particular was insufficient to satisfy the City's 15% manning requirement. For that reason there was no claim or issue below that the Union should have engaged in any means to satisfy the 15% manning requirement other than to jump the minorities on the List in preference to senior non-minorities on the List. The "solution" invented by the Court of Appeals was that the Union should have recruited other unlisted unemployed minority electricians and that they should be referred. The contention is that the latter referrals would be non-objectionable because they "may" have been out of work longer and "perhaps" no union member would be chronologically jumped over. (App. A16). The infirmity of this "solution" is adequately pointed out in the dissent.[22] (App. A25-26) Ironically, the "solution" would let the present minorities on the list remain

[22] Also, contrary to the Court of Appeals contentions (App. A12-13) the Union's list was open to non-minorities, non-minorities knew about the list, and the Union did not restrict its list to members. There was no evidence or claim presented below which supported the Court's contentions. (App. A26, 32, 48 n. 17, 109).

where they were and both they and the listed "senior" non-minorities would be bypassed in favor of "new" minorities to be referred first to City jobs. The "solution" inferentially accepts as a basic premise that it was legally improper to "jump" the lower listed minorities but not legally improper to let previously unlisted minorities "jump over" all of the members on the List including the listed minorities. The illogic is self evident. Neither a purpose to overcome alleged vestiges of previously identified discrimination nor any other compelling state interest is served by preferring one group of minorities over another group belonging to the same minority.

REASONS FOR GRANTING THE WRIT

1. It is important for this Court to settle the question of whether a City may legislatively adopt an affirmative action plan setting goals for region-wide employment of minorities in regard to public and private construction and require preferential hiring of minorities for said City's construction projects where there is no particularized finding of employment discrimination by contractors or unions affected by the plan. That question continues to remain open after *Weber* and *Fullilove* and its resolution is necessary for the guidance of affected members of the construction industry and its employees of all races and sexes and to inform them of what expectations they may have with regard to employment opportunities.

Fullilove did not rule on the scope of authority of a subordinate governmental body of a state to rectify the equivalent of societal employment discrimination nor did it deal with governmentally mandated minority hiring preferences or the implementation thereof. Our case presents issues which are next for resolution in a logical progression from those dealt with in the prior cases. The lower courts, herein, mistakenly relied (App. A11-12, A37) on Justice Powell's comment in *Bakke* that in *Contractors Association of Eastern Pennsylvania v. Secretary of*

Labor (CA 3d, 1971), 442 F.2d 159, cert. den. 404 U.S. 854, and *Associated General Contractors of Massachusetts, Inc. v. Altschuler,* (CA 1st, 1973), 490 F.2d 9, cert. den. 416 U.S. 957, the circuit courts upheld racial preference employment plans based on generalized findings of past discrimination. In *Contractors* the federal *Department of Labor* under the authority of Executive Order No. 11246 as a basis for the promulgation of the Philadelphia Plan, made findings as to *six specific trades* and the plan applied only to those six trades. 442 F.2d 159, 163. The extensive nature and specificity of those findings are detailed in 1970 *Wisconsin Law Review* 341, at 368-373. In the *Associated* case the plan in question was imposed not by a subordinate governmental subdivision of a state, but by the *Commonwealth of Massachusetts* which found minority underrepresentation in *19 specific unions.* 490 F.2d 9, 13. Neither of the above two cases support judicial approval of a conclusionary non-particularized finding made by a subordinate governmental body such as the City of Hartford as a justifiable basis for the City's Ordinance or Plan.

2. The type of implementation complained of, in this case, is that which the facts in *Fullilove* did not reach but left for resolution on another day. That day has arrived. It should be determined whether the ruling below falls on the impermissible side of the line left undefined in *Weber* and *Fullilove.* If the ruling below is left unreviewed, it together with *Fullilove* will lead to a proliferation of similar racial preference hiring plans at all levels of government unrestrained by any realistic limit. Judge Nickerson stated that such programs may be intended [i.e., there is liberty to adopt such programs] to achieve a moral equality rather than as deferred recompense for past injustices (App. A9).[23] That admission candidly

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[23]See, *Contractors Ass'n of Eastern Penn. v. Secretary of Labor,* (CA 3d 1971) 442 F.2d 159 at 176 where the court stated "The Plan does not impose a punishment for past misconduct. It exacts a covenant for present performance."

reveals the policy ground for the decision below. Unimpressed by the holdings of this court denouncing governmental impediments established on the basis of guilt by association the court below permits that concept to have full sway as a device to achieve "moral equality." A governmental entity relying on the ruling below may now declare that society as a whole is "guilty" of discrimination and, therefore, that every employer from the most simple to the most sophisticated enterprise shall be subjected to racial hiring requirements no matter how "innocent" he may be because he *is guilty* of *belonging* to a society where others may have discriminated. It is important for this Court to rule whether or not there is any stopping place along this extraordinary road. See, *Truax v. Raich*, (1915), 239 U.S. 33.

3. The destruction of the Union's Out of Work List conflicts with other rulings by this Court and other circuits and conflicts with national labor policy as discussed above. (supra, 19, 20). It is important for the guidance of the many unions across the nation which use such a referral system previously deemed and ruled to be perfectly legal to know whether their similarly bargained for benefits are now in unrestrained jeopardy.

4. Equally as important for resolution is the conflict between the Court of Appeals ruling and the *Pullman* abstention doctrine or the proper implementation of the pendent jurisdiction doctrine. The opinion below enigmatically fails to locate the source of the City's authority to adopt its Ordinance and Plan and fails to seek any resolution of that question in the state court. This failure to resolve a threshold issue conflicts with *Bakke, Fullilove* and with *Associated Gen., ETC.*[24] and raises a question of whether such a ruling is premature. It if is premature then it is important for this court to so label it so it will not mistakenly be accorded precendental value.

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[24](CA 9th 1980) 616 F.2d 1381.

5. This petition for certiorari raises questions that bear a close similarity to issues already pending before this Court in No. 79-1213, *Minnick v. California Department of Corrections,* petition filed February 6, 1980, certiorari granted, July 2, 1980. In *Minnick*, two of the questions that are raised concern the power of a state agency to voluntarily establish goals, set aside positions and grant preferences for hiring of minorities to the detriment of other applicants and employees based on conclusionary allegations of discriminatory impact of its past policies and practices on minorities. Obviously, those issues have been deemed to be sufficiently important to merit this Court's consideration. Also, there are now pending before this Court petitions for cetiorari in No. 79-1080 *Detroit Police Officers Ass'n v. Young* (pet. cert. filed 1/10/80); No. 79-1061 *Maehren v. City of Seattle* (pet. cert. filed 1/5/80); and No. 79-1996 *District Attorney for County of Sacramento v. Sacramento Civil Service Commission* (pet. cert. filed 6/18/80); which have not been acted upon and in which issues similar to those presented in this case have been raised.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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and

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